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THE HONORABLE STEPHANIE A. AREND

SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR PIERCE COUNTY

WASHINGTON STATE REPUBLICAN  
PARTY, et al.,

Plaintiffs,

v.

KING COUNTY DIVISION OF RECORDS,  
ELECTIONS AND LICENSING  
SERVICES, et al.,

Defendants,

and

WASHINGTON STATE DEMOCRATIC  
CENTRAL COMMITTEE,

Intervenor-Defendant.

NO. 04-2-14599-1

WASHINGTON STATE DEMOCRATS'  
OPPOSITION TO MOTION FOR  
TEMPORARY RESTRAINING ORDER

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## I. INTRODUCTION

Because of the extraordinarily close initial results in the gubernatorial election, a mandatory machine recount was ordered pursuant to RCW 29A.64.021. During the course of that recount, numerous errors were identified – and corrected – by county canvassing boards across the state. Many of those corrections benefited plaintiffs' candidate, but the margin narrowed further, leaving a 42 vote difference. Intervenor then timely requested the current hand recount.

As during the machine recount, a number of counties have identified additional errors, including previously uncounted ballots and errors in disqualifying validly cast ballots by lawfully registered voters. Exercising their authority under a state law, RCW 29A.60.210, that goes unmentioned until late in the TRO motion, county canvassing boards have addressed and corrected such errors during the hand recount, as they did during the machine recount. Some of those corrections have resulted in additional votes for candidate Dino Rossi; others have resulted in additional votes for candidate Christine Gregoire. Neither the candidates nor plaintiffs have – until now – questioned the authority or, indeed, the duty, of the county canvassing boards to correct such errors. Indeed, in the recent Supreme Court action, plaintiffs and the Rossi campaign joined with the Secretary of State in relying upon that "safety valve" authority in obtaining a narrow construction of the recount statute.

On December 15, the King County Canvassing Board considered the discovery of absentee ballots of lawfully registered voters that had been improperly set aside by county election workers because digital versions of the voters' signatures were not readily available. The Secretary of State and his chief elections aide were present. The Board considered the

1 Secretary of State's interpretation of the statute and advice of counsel from the King County  
2 Prosecuting Attorney's Office; found that an apparent discrepancy or inconsistency existed;  
3 and exercised its authority under RCW 29A.60.210 to "recanvass the ballots" and "correct  
4 any error . . . that it finds." The Board ordered staff to confirm from official records the  
5 signatures on the ballots and to prepare them for inclusion in the hand recount.  
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10 Plaintiffs ask the Court to summarily reverse this careful exercise of discretion and to  
11 disenfranchise these lawful voters because of an easily corrected error by King County staff  
12 earlier in the process. The purpose of a recount is to "determine the winner of close contests  
13 . . . as expeditiously and as accurately as possible." RCW 29A.64.070 Notes (legislative  
14 finding). In a bipartisan effort to "get it right," many other counties--with both Republican  
15 and Democratic auditors and following advice of a Republican Secretary of State--have  
16 corrected errors in the machine and hand recounts, often to the benefit of plaintiffs'  
17 candidate. Plaintiffs' evident purpose now is to keep the advantage it gained by error-  
18 correction in other counties but, because King County is one of the last to complete the hand  
19 recount, change the rules and lock in what plaintiffs fear would otherwise be a temporary  
20 lead in the vote count. They seek to undermine what has been a statewide commitment to  
21 correcting obvious, admitted, and plainly apparent discrepancies and inconsistencies and to  
22 count all lawful votes.  
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36 The Court should deny plaintiffs' motion for a temporary restraining order. At the  
37 appropriate time, intervenors will move to dismiss for failure to state a claim and lack of  
38 jurisdiction. For now it is sufficient to show that the King County Canvassing Board has  
39 broad discretionary authority to identify and correct apparent discrepancies and  
40 inconsistencies. Plaintiffs have no right, much less a clear legal right, to stop such  
41 discretionary decisions by appropriate government authorities. Plaintiffs' legal contentions  
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1 here contradict those it advanced before the Washington Supreme Court earlier this week.  
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3 Their factual contentions are supported not by admissible evidence but vague rumor and  
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5 hearsay. And because King County has offered to segregate and separately count the ballots  
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7 at issue, the supposed emergency is a mirage. For all of these reasons, intervenor  
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9 respectfully submits that the Court should deny the motion.

## 10 11 **II. STATEMENT OF FACTS**

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13 On December 3, pursuant to RCW 29A.04.139, intervenor requested a statewide  
14  
15 manual recount. On the same day, intervenor and certain voters facing disenfranchisement  
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17 petitioned the Washington Supreme Court to order that the recount revisit absentee and  
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19 provisional ballots rejected because of erroneously mismatched signatures and other errors.  
20  
21 The Washington State Republican Party intervened, and the Supreme Court scheduled oral  
22  
23 argument for December 13.

24  
25 On Friday, December 9, in response to a public records request, King County  
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27 produced to the Democrats a list of absentee ballot voters whose ballots had not been  
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29 counted because of signature problems. Declaration of William C. Rava ("Rava Decl.")  
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31 ¶ 12. King County Council Chair Larry Phillips' name was on that list. On December 12,  
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33 Phillips apparently called King County, which investigated the situation and determined that  
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35 Phillips' absentee ballot was among a group of absentee ballots that were "mistakenly  
36  
37 rejected because the signature on the ballot did not match the original voter registration  
38  
39 records. In fact, these were signed ballots where a signature was not on file in the county's  
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41 voter registration system. Original registration records should have been retrieved to verify  
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43 the ballot signatures." Rava Decl. ¶ 13, Ex. J (King County statement). On the morning of  
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45 December 13, before the Supreme Court argument, King County issued a press release  
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47 detailing its identification of "previously uncounted ballots" and promising to "retrieve the

1 ballots, review past registration records for signature comparisons and present all valid  
2 ballots to the canvassing board on Wednesday, December 15." *Id.*

3  
4 Much of the Supreme Court argument focused on these very ballots and King  
5 County's ability to consider them during the hand recount. Five of petitioners' declarants in  
6 the Supreme Court action are among these voters. Under questioning by the Supreme Court,  
7 the Republicans, Democrats, Secretary of State, and King County all agreed that RCW  
8 29A.60.210 provided county canvassing boards with the discretion to address and correct  
9 such errors during a recount. The dialogue between Thomas Ahearne, counsel to the  
10 Secretary of State, and the Supreme Court is instructive:  
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19 **Court:** So if that's what's to go on during a recount, then is  
20 what we were just hearing that King County is prepared to do with  
21 these 500 and some odd absentee ballots inappropriate, unlawful,  
22 under, while the recount's going on.  
23

24  
25 **Mr. Ahearne:** No, Your Honor, because counsel referred to it  
26 as a safety valve. There is a provision, 29A.60.210, which people are  
27 referring to as the safety valve, which states that, and it is on page 22  
28 of our brief, whenever the canvassing board finds that there is an  
29 apparent discrepancy or inconsistency in the returns, it may recanvass  
30 the ballots, and that is precisely what.  
31

32  
33 **Court:** So they have the discretion to do it, even in the midst  
34 of a recount?  
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37 **Mr. Ahearne:** Yes, if they're aware of a discrepancy or  
38 inconsistency in the returns.  
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41 **Court:** But don't they have to do that before the day, the last  
42 day for certification that goes on?  
43

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45 **Mr. Ahearne:** It says the canvassing board shall conduct any  
46 necessary recanvass activity on or before the last day to certify the  
47 primary or election.

1                   **Court:**           So can they do that after November 17?

2  
3                   **Mr. Ahearne:** They have not certified the hand recount yet, Your  
4                   Honor.

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6                   Rava Decl. ¶ 14, Ex. K, at 3-4. Mark Braden, counsel for the Republicans, had a similar  
7                   exchange with the Court:  
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10                   **Court:**           Would you agree that during the process of a recount  
11                   the locals have the discretion to recanvass?

12  
13                   **Mr. Braden:** Sure, if there are obvious [unintelligible] the statutory  
14                   requirement in the WAC or regulatory requirement if there are  
15                   discrepancies in the returns, they have a requirement to go back. And  
16                   also in the process of retabulating the ballots in a hand retabulation,  
17                   there is a role for the canvassing board.  
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20                   **Court:**           So you don't disagree that they do have that discretion.  
21  
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23                   **Mr. Braden:** They have the discretion if it's on the face of the  
24                   materials before them.  
25

26                   *Id.* at 6. Counsel for King County and the Democrats also agreed during oral argument that  
27                   RCW 29A.60.210 provided county canvassing boards during a recount with the discretion to  
28                   address and correct errors. *Id.* at 2, 6-7.  
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31                   These positions were unremarkable. Before oral argument, the Secretary of State  
32                   had on numerous occasions and in numerous public documents stated that RCW 29A.60.210  
33                   allowed counties to correct errors discovered during a recount. For example, in his  
34                   guidelines for the manual recount, the Secretary of State noted that the recanvassing  
35                   procedure applies to the recount process:  
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42                   Counties are reminded that RCW 29A.60.210 provides that whenever  
43                   the canvassing board finds that there is an apparent discrepancy or an  
44                   inconsistency in the returns of an election, the board may recanvass  
45                   the ballots or voting devices in any precincts of the county, and that  
46                   the canvassing board shall conduct any necessary recanvass activity  
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1 on or before the last day to certify the election and correct any error  
2 and document the correction of any error it finds.  
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4 Rava Decl. ¶ 3, Ex. B. Similarly, in a Frequently Asked Questions document posted on the  
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6 Secretary of State's website, he reassured voters that mistakes could be corrected during the  
7  
8 recount process:  
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10 These prior decisions of the canvassing boards will be the basis for  
11 the manual recount. Two exceptions exist to this general rule. First,  
12 if a ballot is discovered in the hand recount that presents issues such  
13 as voter intent not previously resolved, that ballot will be 'canvassed'  
14 to determine voter intent under the same standards and process used  
15 in the original count and the machine recount. Second, any  
16 canvassing board at any time in the original count, machine recount,  
17 or manual recount, may upon finding that a discrepancy or  
18 inconsistency exists, direct a recanvass of any necessary portion of the  
19 ballots.  
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22 Rava Decl., ¶ 2, Ex. A. The Secretary of State reiterated this point to the press on several  
23 occasions. See Rava Decl. ¶ 4, Ex. C (Washington Orders Third Count in Governor's Race,  
24 *Seattle Post-Intelligencer*, Dec. 6, 2004) (quoting Secretary Reed as saying, "However, in  
25 our rules we point out that the canvassing boards have the prerogative to take up and re-  
26 examine any problem ballots that have come to their attention . . .").  
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32 The morning after these reassurances from the Secretary of State and the Republican  
33 Party and Rossi campaign, the Supreme Court held that counties had no obligation to revisit  
34 mismatch signature decisions during a recount but reiterated the counties' discretionary  
35 authority to correct apparent discrepancies or inconsistencies. The Court stated went out of  
36 its way to note that its narrow construction of the recount statute was "subject to the  
37 provisions of RCW 29A.60.210." Rava Decl. ¶ 15, Ex. L, at 3 (emphasis supplied).  
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39 Following the ruling, the Secretary of State reiterated his position on the safety valve statute  
40 and noted that it was key to the Supreme Court's decision:  
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1 Part of the argument that we made before the Supreme Court to get  
2 the decision was that it is not necessary to go back and totally  
3 recanvass to solve problems because the 'safety valve' is there for the  
4 county canvassing board to correct mistakes made by the counties[.] .  
5 . . A county canvassing board can go back and correct mistakes that  
6 have been made by the county, for pretty obvious reasons.  
7

8  
9 Rava Decl. ¶ 16, Ex. M (Court Rules Against Gregoire: Counties Won't be Forced to  
10 Reinspect Invalid Ballots; but Saga's Not Over, *Seattle Post-Intelligencer*, Dec. 15, 2004)  
11 (quoting Secretary Reed).  
12  
13

14 On December 15, Superintendent of Elections Bill Huennekens presented written  
15 and oral reports to the King County Canvassing Board on the mistakenly rejected absentee  
16 ballots. He reported that the ballots had been timely received by the County from lawfully  
17 registered voters and then handled and secured in the same manner as all other absentee  
18 ballots. When elections staff attempted to verify the signatures on the absentee ballot  
19 envelopes, they discovered that King County did not have an electronic signature on file for  
20 the voter. Staff put them aside rather than compare them to the signature in the voter's  
21 original registration form (in hard copy, in the Secretary of State database, or elsewhere). At  
22 the initial certification on November 17, these mistakenly rejected absentee ballots were  
23 described to the Canvassing Board and included in the returns as among the "signature mis-  
24 comparisons," a categorization obviously reserved for ballots where a comparison had  
25 actually been done. Rava Decl. ¶¶ 18, 19, Ex. O. Because no comparison had been done,  
26 they were therefore erroneously reported in the County's returns.  
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40 After Mr. Huennekens' report, the Canvassing Board debated the mistakenly rejected  
41 absentee ballots and heard from the King County Senior Deputy Prosecuting Attorney  
42 responsible for advising the Board. She advised that the Board had the discretion to correct  
43 any discrepancy or error it found during the recount. Two members of the Canvassing  
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1 Board stated that it was clear that an error had been made in processing these mistakenly  
2 rejected absentee ballots, that there was a discrepancy in the results on their face, and that  
3 these ballots should be recanvassed. The third member disagreed. The Canvassing Board  
4 voted to begin immediately recanvassing the ballots: researching voter files to find a  
5 signature, comparing the envelope signature with the signature on file and, if it matches,  
6 removing the ballot from the envelope and preparing it to be counted. The Canvassing  
7 Board has not yet counted the ballots. Rava Decl. ¶ 20.

### 14 III. STATEMENT OF ISSUES

15 Should the Court, in the context of a TRO hearing where no true emergency is  
16 presented, interfere in the ongoing efforts of the King County Canvassing Board under  
17 RCW 29A.60.210 to correct errors in election returns and remedy the mistaken  
18 disenfranchisement of lawful voters?

### 24 IV. EVIDENCE RELIED UPON

25 Intervenor relies upon the Declaration of Chris Grantham ("Grantham Decl."), the  
26 Declaration of William C. Rava ("Rava Decl."), and the Declaration of Russell J. Speidel  
27 ("Speidel Decl.").

### 32 V. AUTHORITY AND ARGUMENT

33 A party seeking extraordinary relief of this type must demonstrate: (1) the likelihood  
34 of prevailing on the merits; (2) a well-grounded fear that a right, which will be established at  
35 trial, will be immediately invaded; (3) that the acts sought to be enjoined will result in actual  
36 substantial injury; (4) that the equities favor the moving party and outweigh the equities of  
37 the responding party; and (5) that an injunction will be consistent with the public interest or  
38 interest of third parties. RCW 7.40.020; *Tyler Pipe Indus., Inc. v. State*, 96 Wn.2d 785, 792  
39 (1982). "[A]n injunction will not issue in a doubtful case." *Wash. Fed'n of State Employees*

1 v. *State*, 99 Wn.2d 878, 888 (1983) (internal quotation marks omitted). Here, the  
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3 Republican Party cannot prevail on the merits, has shown no imminent threat to legal rights,  
4  
5 is in no position to seek equity, and is acting contrary to the public interest in maximum  
6  
7 enfranchisement and in public confidence in the ultimate outcome of this election.

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9 **A. THE KING COUNTY CANVASSING BOARD HAS THE**  
10 **AUTHORITY TO "RECANVASS" BALLOTS DURING THE**  
11 **RECOUNT UNDER RCW 29A.60.210.**  
12

13 **1. RCW 29A.60.210 Gives County Canvassing Boards the Authority**  
14 **to Correct Prior Discrepancies or Inconsistencies.**  
15

16 Washington law expressly authorizes county canvassing boards to address apparent  
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18 discrepancies, inconsistencies, or errors in election returns. Indeed, they "*shall* conduct any  
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20 necessary recanvass . . . and correct any error." RCW 29A.60.210 (emphasis supplied). The  
21  
22 authority exists when there is "something to indicate that an error or a mistake has been  
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24 made; that the total as shown is not a true one." *State ex rel. Doyle v. King County*, 138 Wn.  
25  
26 488, 492 (1926). The Washington Supreme Court has provided examples of such  
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28 discrepancies, such as a "difference between the number of persons who voted and the  
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30 number of votes cast," a "claim[] that any total shown on any return is incorrect," or a "claim  
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32 that the returns as made are actually incorrect." *Id.*  
33

34 The improper rejection of absentee ballots by King County is just such an error or  
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36 discrepancy, and the responsible officials have so concluded. As a result, King County's  
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38 canvassing board has the authority to recanvass those ballots, as it expressly found.<sup>1</sup>  
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43 <sup>1</sup> As discussed below, King County's understanding of its statutory duty is consistent not  
44 only with the statute's plain terms, but also with the construction of the statute by the State's chief  
45 election officer and the rules adopted by the Secretary of State and upon which the hand recount has  
46 been conducted to date. Washington counties, including King County, adopted and followed the  
47 guidelines promulgated by the Secretary of State during the recount process. See Rava Decl. ¶ 11,

1 Nothing on the face of the statute limits or qualifies the canvassing board's authority to  
2 make such a finding except that it must be completed before the final certification of the  
3 election. RCW 29A.60.210.<sup>2</sup> The reading suggested by plaintiffs is contrary to the state  
4 policy "to encourage every eligible person to participate fully in all elections," RCW  
5 29A.04.205, and to the rule that such remedial election statutes are to be construed liberally  
6 in favor of maximum enfranchisement. *Gold Bar Citizens for Good Government v. Whalen*,  
7 99 Wn.2d 724, 728 (1983); see *State ex rel. Pemberton v. Superior Court*, 196 Wn. 468, 480  
8 (1938) (court should avoid "disenfranchis[ing] persons who have voted in entire good  
9 faith"); *Loop v. McCracken*, 151 Wn. 19, 25 (1929) ("error of the election authorities should  
10 not disenfranchise the voter"); *Moyer v. Van de Vanter*, 12 Wn. 377, 382 (1895) (if "the  
11 individual voter . . . should in good faith comply with the law, . . . it would be a great  
12 hardship were he deprived of his ballot through some fault or mistake of an election officer  
13 in failing to comply with a provision of the law over which the voter had no control").  
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Plaintiffs attempt to limit the reach of RCW 29A.60.210 by arguing that the statute  
applies only to the *initial* canvassing of ballots because that count was previously certified  
and even obvious and admitted errors that disenfranchise Washington voters cannot be  
corrected during a recount. See Motion at 10-11. In addition to being contrary to the Rossi

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Ex. I (Declaration of Dean Logan ¶ 7, *McDonald et al. v. Secretary of State*, No. 76321-6 (Wash.  
Dec. 14, 2004)).

<sup>2</sup> Pursuant to RCW 29A.60.140, the canvassing board may not delegate its authority to  
determine the validity of challenged ballots, and under RCW 29A.60.050, whenever counting center  
personnel have a question about the validity of a ballot that they are unable to resolve they have to  
deliver them to the canvassing board for processing and preserve them the same as valid ballots.  
These are lawfully registered voters and that, under RCW 29A.08.810, is "presumptive evidence of  
[the voter's] right to vote." Challenged ballots are to be invalidated only upon "clear and  
convincing" proof. RCW 29A.08.820. The failure to present these ballots to the canvassing board  
before December 15 was itself an error that the board was entitled to correct.

1 campaign's acceptance of error correction in other counties, plaintiffs cite to no authority to  
2 support their argument, and there is none. In fact, the statute expressly refers to error  
3 correction "on or before the last day to certify the . . . election," and the election will be  
4 certified following the hand recount. *See, e.g.*, RCW 29A.64.061. "[L]ast day" is an  
5 obvious acknowledgement that there is more than one certification in the event of one or two  
6 recounts. This is precisely the point made by counsel for the Secretary of State during  
7 arguments before the Washington Supreme Court. There is no reason the Legislature would  
8 have intended the statute to apply only during the initial canvass. The very purpose of a  
9 recount is to ensure greater accuracy and confidence in the results. And if the Legislature  
10 had intended to limit the application of the statute to the initial certification, it could easily  
11 have so provided.

12 Moreover, plaintiffs' argument dramatically contradicts positions articulated by  
13 plaintiffs before the Washington Supreme Court in *McDonald et al. v. Secretary of State*.  
14 There, candidate Rossi and plaintiff party took the position that canvassing boards have the  
15 authority to recanvass during the process of a recount. *See* Rava Decl. ¶ 14, Ex. K, at 3-6.  
16 They cannot now be heard to argue the opposite point: that canvassing boards do *not* have  
17 such authority. Having relied on the opposite interpretation in the Washington Supreme  
18 Court, the Republican Party is estopped from making this argument. *See, e.g., Helfand v.*  
19 *Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) ("The integrity of the judicial process is  
20 threatened when a litigant is permitted to gain an advantage by the manipulative assertion of  
21 inconsistent positions, factual or legal.").<sup>3</sup>

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<sup>3</sup> At the same time that plaintiffs are in front of this Court claiming that these ballots should  
*not* count, they are collecting signature verification information from these voters by suggesting that  
they will assist these voters in ensuring that their ballots *do* count. *See* Rava Decl. ¶ 23, Ex. R. This

1 The argument is also contrary to a ruling of the King County Superior Court in  
2 dismissing a claim that plaintiff Republican Party made in that court last month and which  
3 the Party has now appealed. In that action, the plaintiffs here (there, defendant-intervenors  
4 who filed a cross-claim) moved for a temporary restraining order to prohibit King County  
5 from considering documents delivered by third parties to King County in an effort to verify  
6 signatures on ballot envelopes. Rava Decl. ¶ 7 Ex. E. Judge Lum denied the motion,  
7 holding that because "there is no showing that King County is violating the law," the  
8 Republicans had failed to show "a clear legal right to the relief [sought]." *Id.* at 6. As here,  
9 the Republicans also raised unsubstantiated claims of voter fraud in King County. *Id.* at 6  
10 ("What is clear is that there is no actual evidence of voter fraud presented to this Court.").

21 **2. The Secretary of State Has Similarly Interpreted RCW 29A.60.210**  
22 **to Apply to Recounts.**

24 Not only is there a reason that plaintiffs have not returned to the King County  
25 Superior Court again, but there is a similar tactical reason that plaintiffs have not made the  
26 State's chief election officer a party to this action. In addition to the text of the statute itself,  
27 the construction given to it by the Secretary of State stands in stark contrast to plaintiffs'  
28 strained effort to belatedly change the rules and limit the lawful votes counted during the  
29 recount. In judicial proceedings involving this election, and in guidance offered and  
30 distributed to canvassing boards throughout Washington, the Secretary of State has  
31 construed RCW 29A.60.210 to authorize canvassing boards to do precisely what defendants  
32 did.

44 is not plaintiffs' first flip-flop on this issue. Prior to the original certification, plaintiff party argued  
45 to the King County Superior Court, in a lawsuit by intervenor seeking lists of excluded ballots, that it  
46 is improper for third parties to deliver signature verification forms, while at the same time soliciting  
47 such forms from voters. *See* Rava Decl. ¶ 6, Ex. E at 5; *id.* ¶ 5, Ex. D.

1 First, the Secretary of State has unmistakably articulated his position in earlier  
2 litigation involving this election. In the Supreme Court, the Secretary of State repeatedly  
3 argued that RCW 29A.60.210 allows canvassing boards to address particular errors during  
4 the recount process. Rava Decl. ¶ 9, Ex. G, at 3, 11, 22. During oral argument before the  
5 Court earlier this week, the Secretary of State used the King County ballots as the classic  
6 example of a proper application of RCW 29A.60.210. *Id.* ¶ 14, Ex. K, at 5.  
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12 Second, the Secretary of State has repeatedly provided guidance to Washington  
13 county canvassing boards and to its voting public that RCW 29A.60.210 provides authority  
14 for county canvassing boards to address and correct apparent discrepancies and  
15 inconsistencies during the recount. *Id.* ¶ 2, Ex. A; ¶ 3, Ex. B; ¶ 4, Ex. C; ¶ 16, Ex. M.  
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21 **3. The Washington Supreme Court Confirmed That RCW**  
22 **29A.60.210 Applies to the Recount.**  
23

24 The Washington Supreme Court's order in *McDonald et al. v. Secretary of State et*  
25 *al.* explicitly makes RCW 29A.60.210 available to correct errors or discrepancies in the  
26 hand recount. It stated that, under Washington's statutory scheme, ballots are to be  
27 "retabulated" only if they have been previously counted or tallied, *subject to the provisions*  
28 *of RCW 29A.60.210.*" Rava Decl. ¶ 15, Ex. L, at 3 (emphasis supplied).  
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33 As discussed above, the Secretary of State argued to the Washington Supreme Court  
34 that RCW 29A.60.210 is available for canvassing boards to correct errors and  
35 inconsistencies during the recount. During oral argument, King County agreed with the  
36 Secretary of State's statements regarding the ballots now at issue. *See id.* ¶ 14, Ex. K, at 3-6.  
37  
38 And the plaintiffs *agreed* with the Secretary's interpretation as well. *See id.* at 6-7.  
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43 Thus, the respondents in *McDonald v. Secretary of State* – the Secretary of State,  
44 King County, and Dino Rossi and the Republican Party – all reassured the Court that the  
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1 "safety valve" provision was available when specific errors or inconsistencies are discovered  
2 during the recount process. And the Supreme Court relied on that assurance in finding that  
3 canvassing boards are not *required* to revisit every ballot, but that recounts were subject to  
4 RCW 29A.60.210. *Id.* ¶ 15, Ex. L, at 3.  
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8  
9 **B. OTHER WASHINGTON COUNTIES HAVE CONSISTENTLY**  
10 **APPLIED RCW 29A.60.210 TO ALLOW CORRECTION OF ERRORS**  
11 **DURING BOTH RECOUNTS – AND WITHOUT OBJECTION.**  
12

13 RCW 29A.60.210 has been applied consistently in this election to provide election  
14 officials with the authority to correct errors identified during the machine and hand recounts.  
15 That fact is obvious from the face of the differences in tallies between the original count and  
16 the machine recount, as well as the differences in tallies between the machine recount and  
17 the results of the hand recount that have been reported to date. *See* Rava Decl. ¶ 22, Ex. Q.  
18 In particular, canvassing boards for several counties have counted "found ballots" that were  
19 not counted in the original count. Since the initial certification on November 17, the  
20 following counties have included new, uncounted ballots to the benefit of plaintiffs'  
21 candidate:  
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31 • Chelan County: one mistakenly disqualified absentee ballot was accepted,  
32 opened, and counted for Mr. Rossi;  
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- 34  
35 • Skagit County: 147 provisional ballots that were uncanvassed in the initial  
36 count were accepted, opened, and counted, resulting in a net gain of 18 votes  
37 for Mr. Rossi;  
38
- 39  
40 • Snohomish County: 223 ballots not included in the initial certification were  
41 found, accepted, opened, and counted, resulting in a net gain of  
42 approximately 11 votes for Mr. Rossi; and  
43
- 44  
45 • Whatcom County: seven ballots were found, accepted, opened, and counted,  
46 resulting in a net gain of one vote for Mr. Rossi.  
47



1 Grantham Decl. ¶ 6; Speidel Decl. ¶¶ 3-7, Ex. A.

2 These counties all applied their discretion under RCW 29A.60.210 to ensure that  
3 votes that were improperly excluded during the original or machine recounts are counted.  
4  
5 Intervenor's interests were damaged by such action, but it was the right thing to do.  
6  
7 Plaintiffs did not complain about the recanvassing of new ballots in other counties where the  
8 results of doing so improved their candidate's vote total. *E.g.*, Speidel Decl. ¶ 7. It is only  
9 now, when the correction of past error may (or may not) count in favor of Ms. Gregoire, that  
10 plaintiffs seek judicial intervention into the recount process. And they do so without even  
11 having asked the Secretary of State to change his official position, without challenging that  
12 official position by bringing him into this action, and without including the other counties  
13 whose past actions would effectively be invalidated by the ruling plaintiffs seek from this  
14 Court.  
15

16 For plaintiffs to have sat silently on their position for so long and then to seek late in  
17 the hand recount to change the rules for only one county, and without joining in this action  
18 the other counties or the Secretary of State, is itself a sufficient reason to deny equitable  
19 relief. Plaintiffs have intentionally created a situation in which the Court must either  
20 invalidate actions by counties that are not before it or engage in patently unfair and  
21 inconsistent treatment of similarly situated Washington voters.  
22

23 A party seeking equity must do equity, and plaintiffs instead seek a desperate tactical  
24 advantage. The Secretary of State has made plain to the counties that they can and should  
25 use the authority of RCW 29A.60.210 to ensure that the final results of the recount  
26 accurately and completely reflect the will of the people of the State of Washington as  
27 expressed through validly cast ballots. Washington counties have invoked that authority to  
28 correct errors without regard to the candidate thereby benefited. The Court should decline  
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1 plaintiffs' invitation to selectively intervene in one, but not all, counties, to overturn the plain  
2 meaning of RCW 29A.60.210, and to reject the settled construction of that statute by the  
3 Secretary of State and the county canvassing boards.  
4

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6  
7 **C. PLAINTIFFS' CONSTRUCTION OF RCW 29A.60.210 IS**  
8 **UNSUPPORTED BY THE TEXT OF THE STATUTE AND IS**  
9 **INCONSISTENT WITH PLAINTIFFS' PRIOR POSITIONS.**  
10

11 Plaintiffs' only remaining argument is that the statute only authorizes correction of  
12 strictly mathematical errors obvious on the face of the "returns." Thus, errors in failing to  
13 count even concededly legitimately cast ballots by Washington voters cannot, by plaintiffs'  
14 reasoning, be corrected during a recount because those uncounted ballots do not constitute  
15 "apparent discrep[an]cies or inconsisten[ci]es in the returns."  
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21 This argument fails on every level. It is inconsistent with the statute, with cases  
22 construing it, and – perhaps most starkly – with the conduct of not only the machine recount  
23 (without plaintiffs' objection) but also this very hand recount in other counties.  
24  
25  
26

27 As the Supreme Court has held, a "discrepancy in the returns" can and does include  
28 situations where the returns as made "are actually incorrect," such that the "total as shown is  
29 not a true one." *Doyle*, 133 Wash. at 492. That is certainly the case here as to the returns of  
30 counted and invalidated ballots at the conclusion of the initial count and the machine  
31 recount. Moreover, RCW 29A.60.210 is not limited to the returns provided by the county  
32 auditor to the Secretary of State, only "the returns of a primary or election." *Id.* And the  
33 returns, contrary to plaintiffs' arguments, include more than the literal number tendered to  
34 the Secretary of State at the end of a tabulation. "Returns" also includes reports from  
35 individual precincts provided to the county auditor. RCW 29A.44.530 ("The precinct  
36 election officer picking up the election supplies and returning the election returns to the  
37 county auditor . . ."); *see also* RCW 29A.16.060 ("returns" include reports from individual  
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precincts). Those precincts from which the ballots in question were disregarded contained discrepancies in their returns by failing to include those ballots, as the King Count Canvassing Board explicitly found. Rava Decl. ¶ 20.

Similarly, RCW 29A.60.210 clearly permits canvassing boards to "recanvass the ballots," not simply to recanvass the returns. The plaintiffs have previously acknowledged, as they must, that the act of canvassing as defined by statute includes more than the mere search for mathematical errors. RCW 29A.04.013; Rava Decl. ¶ 10, Ex. H at 25 ("Thus, a tabulation is part of a canvass, but *a canvass involves additional tasks beyond a tabulation.*") (emphasis supplied).

Consistent with the statute's terms and its construction by the Secretary of State and the Washington Supreme Court, the entire recount in this very election has been conducted by the canvassing boards throughout this state with the understanding – and utilization – of authority under RCW 29A.60.210 to identify and correct errors that are not strictly mathematical errors in the "returns." As noted above, Chelan, Skagit, Snohomish, and Whatcom Counties all identified, canvassed, and counted previously unidentified ballots, *in every case resulting in net gains for candidate Rossi*. Plaintiffs did not complain even once of the exercise of authority to identify and correct those apparent inconsistencies and discrepancies. To the contrary, their mantra has been that the rules should not be changed midstream.

**D. PLAINTIFFS' ALLEGED SECURITY CONCERNS DO NOT JUSTIFY THE EMERGENCY RELIEF THEY SEEK.**

Intervenor is not in a position to directly address the ballot security concerns raised by plaintiffs. King County has assured intervenor that security was not breached, and intervenor has no reason to question that. Moreover, it is apparent from the face of the

1 declarations filed by plaintiffs that they are acting on rumor, hearsay, and speculation.  
2  
3 Because King County has already offered to segregate and separately count these ballots,  
4  
5 there is no reason for judicial intervention at this time. If these ballots turn out to be  
6  
7 dispositive of the election, plaintiffs can decide whether to proceed with an election contest  
8  
9 and there will be an opportunity for exploration of plaintiffs' conclusory and inflammatory  
10  
11 factual allegations. If these ballots are not dispositive, then plaintiffs' allegations are moot.  
12

### 13 VI. CONCLUSION

14  
15 Intervenor respectfully requests that the Court deny the Motion for a Temporary  
16  
17 Restraining Order.

18  
19 DATED: December 17, 2004.  
20

21  
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23  
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